THE SUPREME COURT OF THE STATE OF ALASKA

MARK ST. DENNY,	)	
	)	Supreme Court No. S-13263
Appellant,	)	
	)	Superior Court No. 3KO-03-346 CI
v.	)	
	)	MEMORANDUM OPINION
TERRI HUNTER,	)	AND JUDGMENT[*]
	)	
Appellee.	)	No. 1356 – March 3, 2010
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kodiak, Joel H. Bolger, Judge.

Appearances: G.R. Eschbacher, Anchorage, for Appellant. Robin A. Taylor, Law Office of Robin A. Taylor, Anchorage, for Appellee.

Before: Carpeneti, Chief Justice, Fabe, Winfree, Christen, Justices, and Matthews, Senior Justice pro tem.[**]

I. INTRODUCTION

A mother planned to move out of state with her minor child. The trial court granted the mother primary physical custody and the authority to make any medical

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[*] Entered pursuant to Appellate Rule 214.

[**] Sitting by assignment under article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

decisions for the child. It also set a partial visitation schedule for the father, but left additional holiday and weekend visitation to the agreement of the parties. The father appeals, asserting that the court erred in its finding that there were legitimate reasons for the move, in its best interest analysis, in its award of authority for medical decisions, and in failing to set a visitation schedule that was more specific concerning additional visitation. We affirm in all respects, but note that on remand the trial court should provide a more specific framework for additional visitation upon motion by either party if justified by the intervening history of the parties' conduct.

II. FACTS AND PROCEEDINGS

Mark St. Denny and Terri Hunter married in Kodiak in 1997 and divorced there in 2005. They have two minor children: Lauren, born January 18, 1999; and Jessica, born to Terri on April 25, 1993, and adopted by Mark. The divorce decree granted joint legal custody for both children, granted Terri primary physical custody, and established a detailed visitation schedule for Mark.

Lauren began seeing a counselor in December 2006 to address feelings of anxiety related to the divorce. Lauren continued seeing the counselor at least through May 2008. Terri supported Lauren's counseling and attended a number of Lauren's sessions. Mark initially attended some sessions but later opposed the counseling, accusing the counselor of having lost her objectivity.

From 2005 through 2007, the parties filed numerous motions with the trial court regarding custody and visitation modifications. In 2007 the court granted Terri sole legal custody of Jessica and ended Mark's visitations with Jessica due to a deterioration of their relationship. The parties retained joint legal custody for Lauren, and Terri retained primary physical custody.

In spring 2008 Terri told Mark that she intended to move to the Pacific Northwest the following summer with both girls. Mark moved to modify custody and visitation for Lauren. Terri told the court in an affidavit that she planned to move to Hayden, Idaho, in order to be closer to her ailing parents and to provide "increased employment prospects" for her current husband. Mark submitted to the trial court a proposed visitation schedule granting him visitation over summer break, every other Thanksgiving, winter break, spring break, and three days any time he would be within fifty miles of the child. He subsequently argued in a trial memorandum that it was in the child's best interests to remain in Kodiak.

In July 2008 both parties participated with counsel at an evidentiary hearing. Mark testified about his close relationship with Lauren, his concerns about how the move to Idaho would affect his relationship with Lauren, his doubts concerning Terri's reasons for moving, his desired visitation schedule if Lauren did move to Idaho, and his objections to Lauren's counselor. Lauren's counselor testified about Lauren's close relationship with her mother and father, Lauren's fear of having to stay in Kodiak, and her concern that Lauren would become depressed if she were removed from her mother. Terri testified about her reasons for relocating, her suggestions for Mark's visitation schedule, and Lauren's desire to live with her.

After reviewing the statutorily provided best interest factors,[1] the trial court found "a substantial change in circumstances that require[d] modification of child custody and visitation in the best interest of the child." In an order dated July 25, 2008, the court ordered that Terri retain primary physical custody of Lauren. The court also modified the visitation schedule so that Mark would have visitations over the summer

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[1] AS 25.24.150.

break "from one week after school recesses until three weeks before school begins," one week every spring break, half of Christmas break, and "weekend and holiday visitation in the area where Ms. Hunter resides by agreement of the parties." The court further specified that Terri was "authorized to make any decisions about Lauren's counseling and medical care."

Four days later Mark filed a motion for reconsideration of the July 25, 2008 order, requesting that the court reestablish joint legal custody for Lauren by removing Terri's unilateral ability to make medical decisions. He also asked the court to provide a more detailed visitation schedule and to lengthen his summer visitation. Terri opposed these requests and the court denied them. After Mark filed an appeal with this court, he filed a motion with the trial court for a specific order for a visit in November. The court did not rule on the motion before the visitation was to occur.

In Mark's appeal before this court, he argues that the trial court did not have sufficient evidence to find a legitimate purpose for Terri's move out of state with Lauren. He also argues that the court erred in finding it was in Lauren's best interest to move out of state, giving undue weight to one best interest factor, AS 25.24.150(c)(6).[2] Mark contends that the trial court also gave too much weight to the testimony of Lauren's counselor. He asserts that the trial court erred in giving Terri sole authority to make medical decisions for Lauren. Mark further argues that the trial court erred by not providing a more detailed visitation schedule in its order. He asks this court to reverse the trial court's decision.

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[2] The factor in AS 25.24.150(c)(6) is "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child . . . ."

Terri asserts that the trial court's finding that her move was legitimately motivated was supported by the evidence, as were the court's best interest findings. She also argues that the court did not abuse its discretion in granting her sole legal custody regarding medical decisions.

III. DISCUSSION

A. Standard of Review

"Trial courts have broad discretion in determining child custody."[3] We review custody and visitation determinations for an abuse of discretion.[4] An abuse of discretion has occurred if the trial court "considered improper factors or failed to consider statutorily-mandated factors, or improperly weighted certain factors in making its determination."[5] We reverse a trial court's controlling factual findings only if they are clearly erroneous.[6] Findings are clearly erroneous if this court is "left with a definite and firm conviction on the entire record that a mistake has been made, even though there may be evidence to support the finding."[7] We give " 'particular deference' to the trial court's factual findings when they are based primarily on oral testimony" because the trial court is better able to judge credibility of witnesses and weigh conflicting evidence.[8]

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[3] *Ebertz v. Ebertz*, 113 P.3d 643, 646 (Alaska 2005).

[4] *Eniero v. Brekke*, 192 P.3d 147, 151 (Alaska 2008); *Virgin v. Virgin*, 990 P.2d 1040, 1043 (Alaska 1999).

[5] *Gratrix v. Gratrix*, 652 P.2d 76, 79-80 (Alaska 1982).

[6] *Jenkins v. Handel*, 10 P.3d 586, 589 (Alaska 2000).

[7] *Id.* (internal citations omitted).

[8] *Ebertz*, 113 P.3d at 646 (quoting *In re Adoption of A.F.M.*, 15 P.3d 258, 262 (Alaska 2001)).

B. The Trial Court Had Sufficient Evidence To Find Legitimate Reasons for Terri's Relocation.

We have set forth a "two-step approach for analyzing a custodial parent's desire to move out-of-state with a child."[9] First, the trial court must decide whether the reasons for the move are "legitimate."[10] A move is legitimate if the primary motivation is not to make visitation more difficult for the other parent.[11] Second, if the move is legitimate, the trial court must analyze the best interests of the child.[12]

Mark asserts that the trial court erred in deciding that Terri's move out of state was for a legitimate purpose because the court (1) depended on Terri's "transparent and insufficient" reason for moving, (2) did not address issues that Mark raised during the hearing, and (3) "provided no analysis" for its decision. Terri challenges all three points.

At the custody modification hearing, Terri testified about her reasons for moving, namely to be closer to her ailing parents and to find work for her husband. Mark disputed the accuracy of these reasons during the hearing through cross-examination and his own testimony. The court found Terri's reasons to be legitimate and found that the move was not motivated by a desire to make visitation more difficult.

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[9] *Eniero*, 192 P.3d at 150.

[10] *Id.*

[11] *Id.* (citing *Moeller-Prokosch v. Prokosch*, 27 P.3d 314, 316 (Alaska 2001)).

[12] *Id.*

These considerations show that the decision did not lack "analysis" and the court did not abuse its discretion.[13] The court considered the proper factors — whether the move was primarily motivated by legitimate or illegitimate reasons — and applied the factors to the oral testimony and conflicting evidence presented by the parties. The trial court's findings do not have to be extensive; they just have to give us "a clear indication of the factors which the [trial] court considered important in exercising its discretion or allow [us] to glean from the record what considerations were involved."[14] The trial court here clearly stated its reasoning. The trial court's finding that the move was motivated by legitimate reasons was not clearly erroneous.

C. The Trial Court Did Not Err in Deciding It Was in Lauren's Best Interests To Move Out of State.

After a court determines that a move is primarily motivated by legitimate reasons, the court "must analyze the best interests of the child while assuming that the planned move has already occurred."[15] In analyzing the best interests, the court must consider the following factors:

> (1) the physical, emotional, mental, religious, and social needs of the child;
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> (2) the capability and desire of each parent to meet these needs;

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[13] *See id.* (accepting trial court's finding that mother's desires to live closer to family and to limit father's ability to be involved in daughter's life were legitimate).

[14] *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 139 (Alaska 1997) (examining trial court's consideration of best interest factors in child custody case); *see also Bird v. Starkey*, 914 P.2d 1246, 1249 & n.4 (Alaska 1996) (explaining that rule applies in child support matters).

[15] *Eniero*, 192 P.3d at 150.

> (3) the child's preference if the child is of sufficient age and capacity to form a preference;
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> (4) the love and affection existing between the child and each parent;
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> (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
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> (6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child . . . ;
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> (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;
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> (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;
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> (9) other factors that the court considers pertinent.[16]

Mark argues that the trial court gave too much weight to the counselor's testimony when examining factors (1) and (3). He asserts that the trial court failed to analyze the importance of factor (5), pointing to Lauren's ties to the Kodiak community. Mark also argues that the court did not properly take into account under factor (6) Terri's illegitimate reasons for moving and her attempts to disturb the father-daughter relationship. Terri argues that this court should uphold the trial court's clear, factually supported decision about Lauren's best interests.

After hearing all the testimony, the trial court referred to each best interest factor and applied each to the testimony it had heard. The court analyzed Lauren's best interests assuming the move had already occurred. It found that, assuming the mother

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[16] AS 25.24.150(c).

moved to Idaho, Lauren's relationship with her father would be disturbed, but it would not be as "emotionally devastating" as staying in Kodiak with her father after her mother moved. Overall, it found that factors (2), (3), and (5) favored granting custody to Terri, and all other factors did not favor either parent.

We defer "to the trial court's determination of witness credibility; the trial court appropriately decides what weight to afford witness testimony."[17] Mark's assertion that the trial court "did not take into account" evidence that he had presented and gave too much weight to the counselor's testimony does not suggest error on the court's part, but rather that the court used its discretion to "accept the testimony of one witness over another."[18] The court did not have to take into account Terri's illegitimate reasons for moving in the best interest analysis because it found no illegitimate reasons for moving in the first step of the analysis.[19]

The trial court appropriately assessed the strength and credibility of each witness's testimony and supported its decision with factual findings; we have no basis for disturbing the trial court's assessment.

D. The Trial Court Did Not Err in Authorizing Terri To Make Decisions About Lauren's Medical Care.

Mark argues that the trial court, in authorizing Terri to make decisions about Lauren's counseling and medical care, "sua sponte changed the legal custodial arrangement." He argues that this is error because neither party requested a change in

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[17] *R.M. v. S.G.*, 13 P.3d 747, 753-54 (Alaska 2000).

[18] *Virgin v. Virgin*, 990 P.2d 1040, 1048 (Alaska 1999).

[19] *Cf. Eniero v. Brekke*, 192 P.3d 147, 150 (Alaska 2008) (stating that when court finds illegitimate reasons for moving in first step of analysis, it can take them into account in second step).

legal custody, argued the issue, or presented evidence, and the court did not set forth its reasoning for the change on the record. Terri responds that "it was reasonable for the court to grant sole legal custody to the mother for purposes of making medical decisions."

In the initial divorce decree, the trial court defined joint legal custody as "the exchange of information regarding the children's education and medical needs and other important matters." This definition includes decisions regarding Lauren's counseling and medical care. The court specified that if Terri and Mark could not come to an agreement about a decision, they had to first "discuss the matter with a family counselor," then "participate in mediation," then, "as a last resort, bring the issue back before the Court." The court's decision in July 2008 authorizing Terri to make any decisions about Lauren's counseling and medical care was a shift in legal custody because Terri would no longer be required to consult with Mark or go through counseling or mediation before making a decision.

In child custody cases, the court may modify a custody order when "necessary or proper"[20] and "in accordance with the best interests of the child."[21] "[T]he trial court may decide issues on its own motion, as long as a party has raised them and both sides have the opportunity to present full testimony."[22] In this case, Mark raised the issue of custody. He did not have to raise the specific issue of legal custody.[23] The trial

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[20] AS 25.24.150(a).

[21] AS 25.24.150(c).

[22] *T.M.C. v. S.A.C.*, 858 P.2d 315, 318-19 (Alaska 1993).

[23] *See T.M.C.*, 858 P.2d at 318-19 (awarding "sole legal custody" to mother, although father's motion had raised issue of "custody").

court held a hearing at which both parties presented evidence about their disagreement over Lauren's counseling sessions.

Trial courts "are encouraged to state all of their findings in their written orders, [but] are not required to do so as long as the basis for their decisions is clear from the record and thus susceptible to review."[24] In its oral findings, the court did not explicitly address changing legal custody or decision-making power for medical care but did acknowledge the "great deal of difficulties . . . concerning trying to coordinate with counseling, and trying to give [Lauren] some kind of outlet to discuss issue[s] with her father." The court referred to this finding in determining that it was in the best interests of the child to remain in the mother's custody and stated that it would "issue a written order that incorporates these findings." The oral findings were sufficient to give this court "a clear indication" of the factors the trial court used in its decision to change legal custody.[25]

Because a party raised the issue of custody, both parties had the opportunity to present testimony, and the court made a reviewable decision based on the best interests of the child, the court's modification was not an abuse of discretion.

E. The Trial Court Did Not Abuse Its Discretion in Failing To Set Out with Specificity a Framework for Additional Visitation.

The order of visitation of July 25, 2008, provided that Mark should have lengthy summer visitation, one-week visitation every spring break, and visitation during one half of every Christmas break. The order also provided for additional weekend and holiday visitation where Terri resides "by agreement of the parties." Mark argues that the court erred in not providing for a detailed order concerning additional weekend and

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[24] *Duffus v. Duffus*, 932 P.2d 777, 779 (Alaska 1997).

[25] *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 137 (Alaska 1997).

holiday visitation: "The difficulties evident between the parties are clear and make necessary a specific order to ensure that Mark and Lauren have the maximum contact with each other consistent with her best interest. To leave it to the parties to agree, amounts to no additional visitation."

In support, Mark describes a motion he made on October 9, 2008, after filing his notice of appeal,[26] in which he sought an order for a visitation with Lauren between November 7 and November 11, 2008. He wanted Terri to drive Lauren from her home to the Spokane airport, where he would pick Lauren up and travel with her to Seattle for a long weekend. The motion also sought a more general order "providing that [Mark], upon two weeks email notice, may have visitation on weekends." Mark's affidavit in support of the motion referred to an aborted October 2008 visit. Mark accused Terri of "continually putting up roadblocks" and described a need for "clear rules . . . so that I can have an open, loving and frequent relationship with our child."

Terri opposed this motion. She noted Mark's proposed visit would cause Lauren to miss school. She objected to driving Lauren to the Spokane airport — a distance of some fifty-five miles from Lauren's "residential area" — for Mark's "discretionary travel." Terri also denied erecting roadblocks for the failed October 2008 trip.

The trial court issued a notice in response to Mark's motion, stating:

> Upon his assumption of *pro tem* duties in Kodiak in late October, 2008, this case was administratively reassigned to the undersigned judge, who failed to rule on [Mark's] visitation motion in a timely fashion.

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[26] The notice of appeal was filed on September 11, 2008.

> It is unclear whether there remains outstanding visitation issues. Accordingly, the Court requests that the parties file notice of any pending issues within ten days.
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> [signed] Peter G. Ashman
> Superior Court Judge Pro Tem

It does not appear that Mark filed notice of any pending issues in response.

"The trial court has discretion to allow the parties to develop a visitation schedule independently."[27] If a custodial parent does not comply with a trial court's order for reasonable visitation, the non-custodial parent could return to court for a more specific schedule or an order compelling the custodial parent to cooperate.[28] We have noted that in highly contentious cases, instead of providing an open visitation schedule, "the court should very carefully and precisely fix the term of visitation to facilitate the chances that the custody and visitation schemes will work in the best interests of the children."[29]

Based on the facts of this case as they existed on July 25, 2008, when the court entered the current visitation order, we are unable to say that the court abused its discretion in leaving to the parties' agreement the subject of additional weekend and holiday visitation by Mark when he travels to Idaho, where Terri and the child reside. Mark's motion for reconsideration, made July 29, 2008, predicted difficulties but,

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[27] *Miller v. Miller*, 739 P.2d 163, 164 (Alaska 1987); *see also Turinsky v. Long*, 910 P.2d 590, 593-94 (Alaska 1996) ("We recognize that there will be times . . . when an order providing for 'reasonable visitation' is appropriate.").

[28] *Miller*, 739 P.2d at 164; *see also Havel v. Havel*, 216 P.3d 1148, 1152 (Alaska 2009) ("[W]hen parents who have obtained a flexible order cannot agree on the schedule in practice, it is always appropriate for the court to establish a fixed schedule.").

[29] *Long v. Long*, 816 P.2d 145, 158 n.12 (Alaska 1991).

understandably, relied only on predictions.[30] Terri pointed this out in her opposition to the motion for reconsideration and presented at least the hope that the details of additional visits could be worked out. She stated: "It is in the child's best interest for the parents to work out in-area visitation, and the court's order has provided them the opportunity to do so. Now is the time for the parties to demonstrate that they can work together and make healthy, appropriate plans for their child." Because any disagreements over additional weekend and holiday visitation in Idaho were speculative when the trial court issued the July 2008 order, the court did not abuse its discretion in the order or in denying Mark's motion for reconsideration.

But Mark is not precluded from seeking an order in the future setting out a framework for additional visitation. If he files a motion, and the trial court concludes that since July 2008 the parties have been unable to agree on the particulars of additional weekend and holiday visitation as provided in the court's July 25, 2008 order, the court

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[30] Mark's argument in his motion for reconsideration was as follows:

> The court did not specifically address visitation that the plaintiff shall have when he is in the area where the child resides. The court left it up to the parties' agreement. The plaintiff respectfully requests that the court specifically provide for up to four overnights per months when the plaintiff is in the area where the child resides with 10 days notice. The plaintiff wants to take advantage of three day weekends. The defendant did not find this unreasonable in the testimony and it removes what will probably be a point of contention between the parties if the court specifically sets out the number of overnights that the plaintiff shall have in any month when the child is in the defendant's custody during the school year and he is in the v[i]cinity.

should set a framework for these visits.[31] The framework should cover such matters as the notice that Mark must give in order to exercise visitation, and the frequency and duration of the visits. The court should also consider adding details as to where the child is to be picked up and dropped off, and whether limitations as to where Mark may take the child during such visits should be imposed.

IV. CONCLUSION

The trial court's decision is AFFIRMED in all respects. On REMAND, the trial court should, if warranted, supply a framework for additional weekend and holiday visitation upon motion of either party.

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[31] *See supra* notes 27 and 28 and accompanying text.